Sabah Bank Bhd v Ho Juan Hua & Anor

HIGH COURT (TAWAU) — SUIT NO T111 OF 1988
IAN HC CHIN JC
7 JUNE 1993

Contract *— Guarantee — Past consideration — Loan released before execution of guarantee — No evidence that money was released after date of guarantee — Intention of the parties*

Contract *— Guarantee — Overdraft facilities utilized by a company other than the company named in the guarantee — Whether there was liability under the guarantee — Conduct of guarantors*

Companies and Corporation *— Debenture — Floating charge — Winding up of company within six months of creation of floating charge — Plaintiff suing on guarantee — Whether s 294 of the Companies Act 1965 applied — Companies Act 1965 s 294*

The plaintiffs obtained a judgment in default of appearance against the two defendants who were guarantors in respect of an overdraft facility extended to a company of which they were the directors. The defendants had applied by way of a summons-in-chambers to set aside the default judgment. The defendants made the following contentions:

(i) there was no consideration for the guarantee because the overdraft facilities were given before the execution of the guarantee and there was no evidence that money was released after the date of the guarantee;
(ii) the overdraft facilities were utilized by a company other than the company referred to in the guarantee; and
(iii) section 294 of the Companies Act 1965 applied to limit the liability of the company to only the amount of the loan actually released after or at the time of the execution of the debenture, and interest thereon at the rate of 5%pa only.

Held, dismissing the application:

(1) Whether the guarantee covered past advances as well as future advances depended on the intention of the parties as could be gathered from the language used in the guarantee and was a question of the quantum of liability. Past advances could be good consideration provided that the past advances were at the desire of the guarantors, and there was evidence in this case to infer that the loan was at their desire.

(2) At the time of execution of the guarantee, the defendants were fully aware that the account under the name of the company was used for the benefit of another company, therefore it must have been in the defendants' contemplation, when they signed the

guarantee, that the guarantee was to include the amount owing under the said account.

(3) Section 294 of the Companies Act 1965 would be relevant only if the plaintiffs sued on the debenture or acted under the debenture to recover any moneys due thereunder, whereas, here the plaintiffs were suing on the guarantee. If the guarantee was in respect solely of the moneys due under the debenture, then the defendants would have to be allowed the benefit of s 294. But the guarantee was in respect of overdraft facilities in respect of two accounts operated by the company and not for the amount due under the debenture.

[Bahasa Malaysia summary

Plaintif telah memperolehi suatu penghakiman ingkar kehadiran terhadap kedua-dua defendan yang merupakan penjamin suatu kemudahan overdraf yang telah diberikan kepada syarikat dalam mana mereka adalah pengarah. Kedua-dua defendan itu telah memohon melalui suatu saman dalam kamar untuk mengetepikan penghakiman ingkar tersebut. Mereka telah membentangkan hujah-hujah berikut:

(i) tidak ada balasan untuk jaminan itu kerana kemudahan overdraf telah diberikan sebelum pelaksanaan jaminan itu dan tidak ada bukti bahawa wang telah dilepaskan selepas tarikh jaminan itu;

(ii) kemudahan overdraf itu telah digunakan oleh sebuah syarikat selain daripada syarikat yang dinamakan di dalam jaminan itu; dan

(iii) seksyen 294 Akta Syarikat 1965 berkesan untuk menghadkan liabiliti syarikat itu cuma kepada jumlah pinjaman yang sebenarnya dilepaskan selepas atau pada masa debentur itu dilaksanakan dan faedah pada kadar 5% setahun sahaja.

Diputuskan, menolak permohonan itu:

(1) Sama ada sesuatu jaminan itu meliputi pendahuluan masa lalu dan juga pendahuluan masa depan akan tertakluk kepada niat pihak-pihak yang berkenaan sebagaimana yang boleh difahamkan dari penggunaan bahasa jaminan itu dan ini merupakan suatu persoalan kuantum liabiliti. Pendahuluan masa lalu boleh dianggap sebagai balasan yang baik sekiranya pendahuluan masa lalu itu dibuat atas kehendak penjamin, dan di dalam kes ini, terdapat bukti untuk membuat kesimpulan bahawa pinjaman itu adalah mengikut kehendak mereka.

(2) Pada masa pelaksanaan jaminan itu, defendan menyedari sepenuhnya bahawa akaun yang berada di bawah nama syarikat itu telah digunakan untuk manfaat syarikat yang lain, maka tentu defendan telah menyedari, pada masa mereka menandatangani jaminan itu, bahawa jaminan itu semestinya termasuk wang yang dihutang di bawah akaun itu.

A (3) Seksyen 294 Akta Syarikat 1965 hanya boleh digunakan jika plaintif mendakwa di atas debentur itu atau bertindak di bawah debentur itu untuk mendapat kembali semua wang yang kena dibayar di bawahnya, manakala, di sini plaintif telah mendakwa di atas jaminan itu. Jika jaminan itu hanya berkaitan dengan jumlah wang yang perlu dibayar di bawah debentur itu, defendan akan diberi bantuan s 249. Tetapi jaminan ini berkaitan dengan kemudahan overdraf untuk dua akaun syarikat itu dan bukan untuk jumlah wang yang perlu dibayar di bawah debentur itu.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02–352–93.]

Notes

For cases on floating charges, see 3 *Mallal's Digest* paras 19 and 22.
For cases on past consideration in guarantees, see 3 *Mallal's Digest* paras 964–965, 1167–1169.
For cases on construction of guarantees, see 3 *Mallal's Digest* paras 1170–1176.

Cases referred to

1 *Hock Hua Bank (Sabah) Bhd v Labuan Electronic Centre Sdn Bhd & 5 Ors* (Civil Suit No K494 of 1985) (unreported) (refd)
2 *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 (folld)
3 *Perwira Habib Bank Malaysia Bhd v MET Sdn Bhd & 3 Ors* [1988] 2 CLJ 480 (folld)
4 *Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors* [1988] 3 MLJ 210 (folld)
5 *Development & Commercial Bank Bhd v Syarikat Farmco Sdn Bhd & Ors* [1988] 3 MLJ 275 (folld)
6 *Pacific & Orient Insurance Co Sdn Bhd v Gimstern Corporation (M) Sdn Bhd & Sim Thong Gim & Ors* [1989] 2 CLJ 721 (refd)
7 *Tan Chong & Sons Motor Company Ltd v Yang Chin Lang* [1967] 1 MLJ 123 (refd)
8 *Chew Soon Tat v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 (refd)
9 *Hongkong and Shanghai Banking Corporation v Syarikat United Leong Enterprise Sdn Bhd & Anor* [1993] 2 MLJ 449 (folld)

Legislation referred to

Companies Act 1965 s 294

Paul Kan (*Paul Kan & Co*) for the plaintiffs.
Clement Skinner (*Skinner, Lind, Robertson, Willie, Wong & Chin*) for the defendants.

Cur Adv Vult

Ian HC Chin JC:

I *History*

The plaintiffs took out a writ against the defendants on 18 November 1988. The writ was served on the defendants by way of advertisement in two newspapers on 9 and 10 November 1989. Judgment in default of appearance was entered on 21 December 1989 ('the default judgment'). The defendants applied by a summons-in-chambers dated 12 November 1992 to set aside the default judgment on the ground that they had a good defence on merits. The affidavits filed in support of the application are:

(1) the joint affidavit of the defendants sworn to on 31 October 1992;
(2) the affidavit of the first defendant sworn to on 9 February 1993;
(3) the affidavit of Chong Chee Kong affirmed on 17 May 1993; and
(4) the affidavit of the first defendant affirmed 18 May 1993.

The application was opposed by the plaintiffs and for the purpose, the following affidavits were filed:

(1) the affidavits of Lawrence Chung Thau Yin sworn to on 29 December 1992 and on 13 February 1993; and
(2) the affidavit of Bernard Chan Eng Beng sworn to on 24 May 1993.

I heard arguments on 4 January 1993, 16 February 1993 and 25 May 1993 and reserved my ruling which I now deliver. The hearing was staggered to enable the defendants to gather documentary evidence.

II *Statement of claim*

The plaintiffs' claim against the defendants is for the sum of RM687,785.70 together with agreed interest which one Emporium Man Nung Sdn Bhd ('the company') had failed to repay the plaintiffs and which repayment the defendants, among others, had guaranteed under a guarantee made on 12 April 1985 ('the guarantee').

III *Defendants' contentions*

The defendants maintain that there was no consideration for the guarantee because the overdraft facilities were given before the execution of the guarantee and there is no evidence that money was released after the date of the guarantee. The defendants also contend that the overdraft facilities were utilized by a company other than the company referred to in the guarantee. The defendants finally contend that the company for which they guaranteed repayment, was wound up within six months of the creation of a debenture in favour of the plaintiffs and thus attracts the operation of s 294 of the Companies Act 1965, which limits the liability of the company for only the amount of the loan actually released after or at the time of the execution of the debenture and for interest at 5%pa only; this limitation of liability, the defendants argued, they are entitled to the benefit of, and the default judgment was consequently invalid as it included advances made before the execution of the debenture and that it included interest above the

A 5%pa rate. I will now deal with the contentions, one at a time, and give my decisions. But before doing that, a summary of the undisputed or indisputable facts is made.

IV *Facts of the case*

B The company's dealings with the plaintiffs started in 1983 in Tawau when credit facilities were, pursuant to the plaintiffs' offer dated 22 February 1983 (exh B), given to the company and which the defendants guaranteed repayment of the principal sum of RM250,000 by a guarantee dated 27 May 1983 (exh D). At all relevant times, the defendants, together with five C others, were directors of the company. The directors then decided to expand its business to Sandakan which business 'was to be owned by a separate legal entity to be called Emporium Man Nung (Sandakan) Sdn Bhd'. For that purpose, the then deputy managing director, one Chong Chee Kong, met the then manager of the Sandakan branch of the plaintiff bank and was advised by the said manager 'that as Emporium Man Nung D (Sandakan) Sdn Bhd had not yet been incorporated, any account opened should be under the name of [the Company] pending the incorporation of Emporium Man Nung (Sandakan) Sdn Bhd'. As a result of that meeting, the directors of the company, including the defendants, by a resolution dated 29 November 1983 ('CCKI'), resolved to open an account with the E Sandakan branch of the plaintiff bank. The Sandakan account, numbered 30360 ('the said account'), of the company was thereafter opened. Emporium Man Nung (Sandakan) Sdn Bhd was incorporated on 21 January 1984 and, to the knowledge of the Sandakan manager of the plaintiff bank, commenced business in June 1984.

Pay-in slips for the month of January 1985 showed that moneys were F paid in by Emporium Man Nung (Sandakan) Sdn Bhd into the said account. There is no evidence that any money had been paid out of the said account for the purpose or benefit of Emporium Man Nung (Sandakan) Sdn Bhd. The company applied and the plaintiffs, on 18 March 1985, by a letter ('E1'), approved additional credit for the company up to the maximum amount of RM700,000. For this RM700,000, the defendants, G among others, executed the guarantee. It was stated in the said plaintiffs' offer that the offer 'is to supersede and cancel' the plaintiffs' previous letter of offer ('B'). It was also stated in the said offer that the security for the loan facility shall be: (1) a second charge over certain lands; (2) a debenture; and (3) a joint and several guarantee of all the directors. One purpose of the H loan was stated in the said offer to be for the company's 'additional working capital for their existing business and to facilitate business expansion to Tawau and Sandakan'. For ease of reference, the relevant parts of the guarantee, which was executed pursuant to the approval of the additional credit, are reproduced here:

I 1 In consideration of your making or continuing advances or otherwise giving credit or affording banking facilities (including, inter alia, the issue of guarantees by you and your acceptance by the principal as hereinafter defined in favour of third parties) for as long as you shall think fit to Emporium Man Nung Sdn Bhd (hereinafter called 'the principal') we, the

undersigned, hereby agree to pay to you on demand all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever whether from the principal solely or from the principal jointly with any other person or persons or from any firm in which the principal may be a partner including the amount of notes, bills, discounted or paid, and other loans, credits or advances made to or for the accommodation or at the request either of the principal solely or jointly or of any such firm as aforesaid or for any money for which the principal may be liable as surety or in any other way whatsoever together with, in all the cases aforesaid, all interest, discount and other bankers' charges including ...

2 This guarantee ... shall be a continuing security ...

...

12 This guarantee shall be in addition to and not in substitution for any other guarantee for the principal given by all or any of us to you.

The plaintiffs adduced bank statements (exhs G1, G2, G3 and G4) showing the money advanced by the plaintiffs to have been disbursed before and after the date of the guarantee and to have been utilized by the company in Tawau and in Sandakan through the respective bank accounts under the name of the company. The debenture (exh HJH3) was only issued by the company on 25 October 1985 (and not 21 March 1985 as contended by the defendants). A receiver was, pursuant to the said debenture and pursuant to another unexhibited debenture issued on 12 April 1985 (see the letter, exh HJH9), appointed on 18 January 1986 and a sum of RM68,000 was realized by the receiver under the said debenture. The company was ordered to be wound up by an order of the court made on 27 January 1986 upon the petition of another creditor. When the company failed to repay the loan it resulted in the action and default judgment herein against the defendants. Those are the brief facts of this case. I will now turn to the contentions of the defendants.

V *Conclusions*

A Consideration

Counsel for the defendants argued that because it is stated in the plaintiffs' offer for the said additional credit dated 18 March 1985 (exh E1) that the offer 'is to supersede and cancel' the plaintiffs' previous letter of offer (exh B), the guarantee is for future advances only and not for past advances. It is not in issue that the said default judgment included sums advanced before the execution of the guarantee and it cannot be argued otherwise, on account of the statements produced (exhs G1, G2, G3 and G4), that the default judgment also included sums advanced after the execution of the guarantee. Whether the guarantee covers past advances as well as future advances will of course depends on the intention of the parties as can be gathered from the language they used in the guarantee and is a question of the quantum of liability. I have in the unreported case of *Hock Hua Bank (Sabah) Bhd v Labuan Electronic Centre Sdn Bhd & 5 Ors*,[1] set out the cases where the courts had held that the various guarantees concerned were for existing as well as future debts and these cases were: (1) *Heng Cheng Swee v Bangkok Bank Ltd*;[2] (2) *Perwira Habib Bank Malaysia Bhd v MET Sdn*

Bhd & 3 Ors;[3] (3) *Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors*;[4] (4) *Development & Commercial Bank Bhd v Syarikat Farmco Sdn Bhd & Ors*;[5] and (5) *Pacific & Orient Insurance Co Sdn Bhd v Gimstern Corporation (M) Sdn Bhd & Sim Thong Gim & 4 Ors*.[6] The wordings of para 1 of the guarantee are, word for word, the same as those guarantees referred to in the said cases (1)–(4) where the court held those guarantees were for past as well as for future advances. I am also of the opinion that the guarantee was for past as well as for future advances. This is obvious when the circumstances surrounding the execution of the guarantee are considered — and these are the existence of a previous guarantee for a smaller facility, and the request for a larger facility and the execution of the guarantee for a larger sum following the granting of a larger credit facility — all of which go to show that the parties intended the guarantee to be for past as well as for future advances. The case of *Tan Chong & Sons Motor Co Ltd v Yang Chin Lang*[7] is authority for saying that the surrounding circumstances attending the execution of the guarantee can be considered. There is therefore no merit in this proposed defence of the defendants. What was 'superseded or cancelled' was not the previous guarantee but the offer relating to the said previous guarantee and it is expressly provided in cl 12 of the guarantee that the guarantee 'shall be in addition to and not in substitution for any other guarantee'. I was referred by counsel for the defendants to the case of *Chew Soon Tat v Malaysia National Insurance Sdn Bhd*[8] but unfortunately, the wordings of the guarantee in that case are not reproduced in the judgment and the wordings of the guarantee was remarked by that court to be 'loose'. I am of the opinion that that case is not laying down any principle of law that all guarantees can only be in respect of liabilities incurred after the date of the guarantee. That is a question of quantum which in turn depends on the wordings of each particular guarantee. In so far as liability is concerned, even past advances can be good consideration provided that the past advances were at the 'desire' of the guarantors. I have, in this regard, dealt with the relevant law and cases at length in the case of *Hongkong and Shanghai Banking Corporation v Syarikat United Leong Enterprise Sdn Bhd & Anor*[9] and I do not see any need to repeat here what I have said in that case. Suffice for me to state that in this case, there was money disbursed before and after the execution of the guarantee and there is evidence to infer, the defendants being directors of the company, that the loan was at their desire. There is therefore consideration for the guarantee. The proposed defence could not succeed.

B Utilization of advances

The second contention of the defendants is that part of the advances under the guarantee was utilized by the company's sister company called Emporium Man Nung (Sandakan) Sdn Bhd for which the guarantee does not cover. The plaintiffs adduced bank statements (exhs G1, G2, G3 and G4) showing the money to have been utilized by the company in Sandakan and in Tawau, the company having maintained the said account with the plaintiffs' bank in Sandakan and another account with the plaintiffs' bank in Tawau and with the company utilizing the said loan facility through the said two

accounts. Even assuming that because Emporium Man Nung (Sandakan) Sdn Bhd had on occasions to pay money into the said account and because of such payment, there could be payment out of the said account for the purposes and benefit of Emporium Man Nung (Sandakan) Sdn Bhd, the quantum of liability under the guarantee remains unaffected, and irrespective thereof, the defendants are still liable for the amount due under the said account. In the first place, the guarantee provides for the defendants to be liable for 'all sums of money which are now or shall at any time be owing to (the plaintiffs) anywhere on any account whatsoever' by the company. In the second place, the defendants, by agreeing to the resolution of 29 November 1983 (C3) to open the said account for the use of Emporium Man Nung (Sandakan) Sdn Bhd (which came about, the defendants allege, after the meeting between the said deputy managing director and the said branch manager) and by signing the mandate (C2) to the plaintiffs, must surely have agreed to the said account being used in the manner alleged by the defendants. Therefore, at the time of execution of the guarantee on 12 April 1985, the defendants were fully aware that the said account was so used, and in fact they had allowed the said account to be so used. The defendants did not in any of the affidavits filed herein state that they did not agree to the manner in which the said account had been operated; that they did not is obviously because they had sanctioned the arrangement. That being the case, it must have been in the contemplation of the defendants, there being no dispute at all as to the evidence in this regard, when they signed the guarantee that the guarantee was to include the amount owing under the said account. There is, therefore, no merit in this proposed defence.

C Section 294 of the Companies Act 1965

The final contention of the defendants is that the default judgment herein included moneys that were released subsequent to the execution of a debenture by the company on 25 October 1985 and included interest at 13% and 14%pa. See paras 7 and 17 of the joint affidavit of the defendants. The judgment, according to counsel for the defendants, is therefore defective and unenforceable because s 294 only allowed the plaintiffs to recover moneys released at and subsequent to the execution of the debenture and only interest at 5%pa. The said debenture (exh HJH3), was in fact made on 25 October 1985 and not 21 March 1985. But there appears to be another debenture issued on 12 April 1985 as the letter, exh HJH9, states so. The company was ordered to be wound up on 27 January 1986. I will now examine s 294 of the Companies Act 1965, which for ease of reference I reproduce here:

> A floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of five per centum per annum.

The said s 294 of the Companies Act 1965, is only relevant if the plaintiffs sue on the debenture or acted under the debenture to recover any moneys due thereunder. But it is not the case here. The plaintiffs are suing on the guarantee. I agree with counsel for the plaintiffs that cl 7 of the guarantee expressly provides for the guarantee not to be in any way prejudiced or affected by the said debenture. Therefore, the alleged invalidity of the debenture under s 294 of the Companies Act 1965, does not in any way reduce the amount which the defendants are liable to pay the plaintiffs under the guarantee. If the guarantee was in respect solely of the moneys due under the debenture then the defendants would have to be allowed the benefit of s 294 of the Companies Act 1965. But the guarantee is in respect of, to quote from the guarantee, 'all sums of money which are now or shall at any time be owing ... anywhere on any account whatsoever'. The amount due from the company to the plaintiffs were for overdraft facilities in respect of the said two accounts operated by the company and not for the amount due under the debenture. There is therefore also no merit in this proposed defence of the defendants.

In the premises I dismiss the defendants' application with cost to be taxed.

Application dismissed.

Reported by Lim Chee Wee